No. 21,834-A

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant

v.

WEYERHAEUSER COMPANY,
Appellee

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

REPLY BRIEF FOR THE UNITED STATES AS APPELLANT

MITCHELL ROGOVIN,
Assistant Attorney General
LEE A. JACKSON,
WILLIAM A. FRIEDLANDER,
ELMER J. KELSEY,
Attorneys,
Department of Justice,
Washington, D.C. 20530

Of Counsel:
EUGENE C. CUSHING,
United States Attorney.
J. S. OBENOUR,
Assistant United States Attorney.

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INDEX

CITATIONS

Cases:

Statutes:

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In its answering brief as cross-appellee on the issue involving treatment of the casualty losses to its equipment the taxpayer advanced certain arguments which we believe require comment.

1. Throughout its argument, the taxpayer emphasized that we are dealing here with losses to income-producing property of the type which, under the 1958 amendment to Section 1231, is excluded from its cover-

age. In this connection it should be noted that the statute prior to the 1958 amendment offers no basis whatsoever for any distinction between income-producing (including business) property and property held for personal use—nor does the taxpayer suggest any. Consequently, the taxpayer must stand or fall on the sole argument that *all* wholly uninsured casualty losses, regardless of the purpose for which the property was held, are excluded from the pre-1958 statute.

2. In support of its contention that wholly uninsured losses are excluded from the pre-amendment statute the taxpayer necessarily places sole reliance upon the appearance therein of the phrase "into other property or money" since there is nothing else which could even suggest such an exclusion. In our opening brief on this question (p. 26) we pointed out that the statute, as amended in 1958, made no alteration in the language of the first paragraph of Section 1231(a), in which the phrase in question appears, and yet was expressly stated by the 1958 Congress to cover wholly uninsured losses other than those expressly excluded by the new subparagraph (a)(2) added by the amendment—a coverage which has been approved and applied by the Fourth, Fifth and Sixth Circuits. *Chewning* v. *Commissioner*, 363 F. 2d 441, certiorari denied, 385 U.S. 930; *Campbell* v. *Waggoner*, 370 F. 2d 157; *Morrison* v. *United States*, 355 F. 2d 218, certi-

orari denied, 384 U.S. 986. The taxpayer has offered no suggestion as to how this Court could construe the phrase "into other property or money" as necessarily excluding all wholly uninsured losses from the pre-1958 version of Section 1231, while the same language, unchanged, does not exclude them from the amended statute. It is to be noted that the exclusion of uninsured losses to income-producing property is accomplished in the amended statute by the insertion of a new sentence at the end of Section 1231(a), which necessarily implies that, without that addition, Section 1231(a), including the phrase "into other property or money", would include uninsured losses to property held for that purpose, just as it includes uninsured losses to property held for personal use. The contrary view would make subparagraph (a)(2), and the 1958 amendment, a nullity. Thus, the taxpayer asks this Court to adopt a construction of the critical phrase as used in the pre-1958 statute which is directly opposed to that which it must be given in the statute for years after 1958. While asking this Court to sustain its position on the basis of dubious conjecture from remote indicia, the taxpayer carefully skirts these unanswerable basic considerations.

3. One of the peripheral considerations upon which the taxpayer seeks to place great stress is the

reference in the Committee Report accompanying the 1958 amendment (see Taxpayer's Br. pp. 32-33) to the exclusion of wholly uninsured losses to business and income-producing property in the pre-1958 statute as an "unintended hardship". The taxpayer would have this Court interpret that as an expression of belief by the 1958 Congress that the 1942 Congress, which enacted the original version of the predecessor of Section 1231(a), did not intend wholly uninsured losses to be covered under that provision. That is neither a necessary nor a reasonable interpretation of the comment in the 1958 Committee Report. The taxpayer fails to distinguish between the 1942 Congress' intentions as to the coverage of the statute and, on the other hand, its lack of awareness (and, hence, of intention) with respect to possible hardship from the inclusion under the comprehensive language of the statute of wholly uninsured losses to business and income-producing property. What the 1958 Congress obviously meant was that, as is so often the case when a provision of comprehensive coverage is subsequently amended to exclude certain theretofore covered circumstances, the 1942 Congress had not focused on the possible effect of the provision upon uninsured losses to income-producing property, as opposed to property of a personal nature, and therefore had made no provision for exclusion of the former—thus necessarily including them.

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Hence it was the "hardship" from the inclusion—not the inclusion itself—which was "unintended".

Contrary to the taxpayer's casual assumption (Br. 31, 33), there is no reason to believe from the comments in the 1958 Committee Report that that Congress (1) regarded the Treasury Regulations as the initiator of, or the sole authority for, the inclusion of wholly uninsured losses in the pre-1958 statute, (2) believed this inclusion was contrary to the intent of the 1942 Congress or (3) had any doubt that the language of the statute itself required this inclusion. We point to the very paragraph of the 1958 Committee Report cited by the taxpayer (Br. 32) for the statement that the Congress was *amending* (i.e., changing) the pre-1958 statute—not *clarifying* it so as to correct what the taxpayer alleges to be an incorrect construction in the Treasury Regulations. We also point again to the fact that if the phrase "into other property or money" was intended in the original enactment to exclude wholly uninsured losses, it necessarily excluded those to property held for personal use as well as property held for production of income. If the 1958 Congress believed that the language necessarily had this effect it would scarcely have left the very same language in the amended statute which it expressly intended to cover uninsured losses to all property with the

exception of that held for business and income-producing purposes.

Furthermore, since the 1958 Congress was of the view that the pre-amendment statute included *all* uninsured losses and acted on the belief that special exclusionary language was required to take certain types out of the coverage of the statute for years thereafter, it was, a fortiori, well aware of the fact (and so stated) that uninsured losses to business and income-producing property were (whether by force of the statute alone or as construed in the Treasury Regulations) included for years prior to the amendment. Had it wished to change that coverage it could, and would, have made its exclusionary amendment retroactive. It chose not to do so, but expressly made the change effective only for tax years beginning after December 31, 1957. The taxpayer is here asking this Court to do what the Congress, in full awareness of the situation, could have done, but chose not to do.

4. In attemption to escape the impact of the decisions of the Fourth, Fifth and Sixth Circuits, *supra*, insofar as they bear upon the coverage of the pre-1958 statute, the taxpayer makes the following errors:

(a) Further compounding its unwarranted "unintended hardship" approach, the taxpayer asserts (Br. 39) that the purpose and effect of the Tenth Circuit's

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4. In attemption to escape the impact of the decisions of the Fourth, Fifth and Sixth Circuits, *supra*, insofar as they bear upon the coverage of the pre-1958 statute, the taxpayer makes the following errors:

(a) Further compounding its unwarranted "unintended hardship" approach, the taxpayer asserts (Br. 39) that the purpose and effect of the Tenth Circuit's

decision in *Maurer* v. *United States*, 284 F. 2d 122, was to prevent the "unintended hardship" referred to by the 1958 Congress. But, since that hardship was stated to be only with respect to business and income-producing property, it would be remarkable indeed for the Tenth Circuit to have relieved the hardship in question by holding as excluded from the statute the very type of property as to which the 1958 Congress found no hardship.

(b) As we pointed out in our main brief (pp. 23-24) the Fourth, Fifth and Sixth Circuits have stated their disagreement with the rationale of *Maurer* with respect to the coverage of the pre-1958 statute. The taxpayer now suggests (Br. 36-37) that this disagreement is only with respect to the coverage of the statute in years after the 1958 amendment. This is hardly possible since in *Maurer* the Tenth Circuit did not even mention or acknowledge the 1958 amendment, and its holding was directed solely to the unamended statute as enacted in 1942. Hence any disagreement expressed by the other circuits with *Maurer* could only have been with respect to its views as to the pre-1958 provision. Moreover, a reading of the opinions of the Fourth, Fifth and Sixth Circuits makes it very clear that their disagreement with the Tenth Circuit was in support of their holding that the statute, from its

original enactment in 1942, had covered all wholly uninsured losses and that the 1958 amendment had acted only to exclude those to income-producing property.

(c) Finally the taxpayer seeks to deny the obvious conflict between the Tenth Circuit and the other Circuits with respect to the pre-1958 coverage by suggesting that the expressed disagreement of the latter with the *Maurer* rationale was only dicta because those courts there had before them only losses to property held for personal use, whereas we are here concerned with business property held for the production of income. But the taxpayer ignores the fact, *supra*, that there is no possibility for distinction under the pre-1958 statute between property held for production of income and property held for personal use. Therefore the other Circuits' disagreement with *Maurer*, to the extent that, as reflected in those opinions, it was basic to their comprehensive holding that the phrase "into other property or money" never had the effect of excluding uninsured losses, could not have been dicta.

5. The taxpayer seizes on certain comments in the Government's opposition to the petition for certiorari of the taxpayer in *Chewning* v. *Commissioner*, *supra*, as support for its contention that the *Maurer* decision is not in conflict with those of the Fourth, Fifth and

Sixth Circuits, but distinguishable. However, the Government, as is apparent from the very language quoted from its memorandum in opposition (see Taxpayer's Br. 44) did not say that these was no conflict between the Tenth Circuit and the other Courts of Appeals, or that *Maurer* was distinguishable, but only that there was no conflict with respect to the coverage of the *amended* statute—that being the only question of sufficient continuing importance to require Supreme Court review. The "materially different" language referred to was the addition of the new sentence to subsection (a).

6. We will not undertake an analysis of the arguments by which the taxpayer attempts (Br. 40-43) to question the demonstration in our main brief (pp. 27-36) of the many patent misconceptions which led to the error of the *Maurer* decision. We are content to leave the question to this Court upon a reading of the *Maurer* opinion in the light of the respective comments offered by the parties and of the comments of the Fourth, Fifth and Sixth Circuits. Suffice it to say that the Congress and the three other Courts of Appeals have reached conclusions with respect to the coverage of the pre-1958 statute, and the meaning to be accorded the phrase "into other property or money", directly contrary to those which underlie the holding by the

Tenth Circuit in *Maurer* upon which the taxpayer places sole reliance.

Respectfully submitted,

MITCHELU ROGOVIN,
Assistant Attorney General.
LEE A. JACKSON,
WILLIAM A. FRIEDLANDER,
ELMER J. KELSEY,
Attorneys,
Department of Justice,
Washington, D. C. 20530

Of Counsel:
EUGENE C. CUSHING,
United States Attorney.
J. S. OBENOUR,
Assistant United States Attorney.

March, 1968

CERTIFICATE

I certify that, in connection with the preparation of this reply brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: ..... day of ....., 1968.

United States Attorney